

ALERT

FCC Issues Order In Response to Third Circuit Media Ownership Decision; Requires Amendment of Pending Renewal and Transfer/Assignment Applications

December 30, 2019

On December 20, 2019, the Federal Communications Commission's (FCC's or Commission's) Media Bureau announced anticipated changes to the Commission's media ownership rules to implement the recent decision by the United States Court of Appeals for the Third Circuit vacating a number of the Commission's media ownership rules. The Media Bureau Order amended Section 73.3555 of the Commission's rules to reinstate prior versions of the rule to replace the portions vacated by the Third Circuit. In two accompanying Public Notices, the Media Bureau specified how radio licensees applying for renewal and parties to pending or future transactions must address their compliance with the new rules.

As we previously have discussed, the Third Circuit's September Order vacated the Commission's 2017 Media Ownership Order on Reconsideration and 2018 Incubator Order in their entirety and vacated the revenue-based definition of an "eligible entity" in the FCC's 2016 Media Ownership Order. The Third Circuit issued its mandate on November 29, 2019, at which point the vacated rules were no longer effective.

In response to the Third Circuit's mandate, the Media Bureau's Order revised Section 73.3555 as follows:

- Local Television Ownership: Reinstated the so-called eight-voices test, which requires at least eight independently owned and operating voices to remain in the market following a

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merger, and eliminated the provision of the rule under which the top-four restriction would not apply if applicants demonstrated, and the FCC found, that allowing a top-four combination would serve the public interest, convenience, and necessity.

- Radio-Television Cross-Ownership: Reinstated the limit on the number of commercial radio and television stations an entity may own in the same market, based upon the number of stations in the market.
- Newspaper-Broadcast Cross-Ownership: Reinstated the absolute restriction on the common ownership of a daily newspaper and a television or radio station within the same local market, subject to a case-by-case waiver policy and an exemption for combinations involving failed or failing newspapers or broadcast stations.

In the two accompanying Public Notices, the Media Bureau announced a requirement for radio licensees and parties to pending or future transactions to demonstrate their compliance with the revised version of the media ownership rules. Although the Media Bureau did not address the forthcoming television renewal cycle, we expect it to add a similar requirement for television licensees.

- Radio Licensees Applying for Renewal. The Media Bureau announced new processing guidelines that require radio licensees applying for renewal of a commercial station to report any “violations” of Section 73.3555 as amended. The Public Notice clarified that a station licensee must address compliance with the rule “even if the acquisition of an attributable interest in a newspaper/broadcast combination or radio/television combination has previously been approved by the Commission or its staff.”
 - New Renewal Applications: Licensees filing renewal applications for commercial stations beginning with the February 1, 2020, cycle must answer “no” to the question about “FCC Violations During the Preceding License Term” and provide an explanatory exhibit if they are not in compliance with the current version of Section 73.3555. The Public Notice indicated that the Commission will modify the form at some point in the future to add a specific question about multiple ownership compliance.
 - Pending Renewal Applications: Licensees that have already filed their renewal applications for one or more commercial stations must amend their applications no later than January 19, 2020, to include an attachment either: (1) stating: “The station licensee (and each party with an attributable interest in the licensee) hereby certifies it is in compliance with the Newspaper/Broadcast and Radio/Television Cross-Ownership rules in revised 47 CFR § 73.3555”; or (2) including an explanation of non-compliance along with any necessary showings. The Media Bureau will not process renewal applications until these amendments are received.
- Parties to Assignment/Transfer Applications. The Media Bureau also announced new processing guidelines for the transfer or assignment of commercial television and radio stations.
 - New Assignment/Transfer Applications: Effective immediately, all applications for assignment or transfer of a commercial radio or television station filed on Form 314 or 315 must certify compliance with the amended version of Section 73.3555 and include all necessary showings.

- Pending Assignment/Transfer Applications: Parties with pending applications for assignment or transfer of a commercial radio or television station filed on Form 314 or 315 must amend those applications no later than January 19, 2020 to include, as Exhibit 1, a statement certifying whether each assignee or transferee complies with the amended version of Section 73.3555 and, if not, an explanation with all necessary showings. The Media Bureau will not process pending assignment or transfer applications until these amendments are received.

The Media Bureau expressly stated in the Order and processing guidelines that the Media Bureau's actions were merely intended to implement the Third Circuit's decision as it currently stands and should not prejudice the right of the Commission or any other party to seek further review of the Third Circuit's decision in the U.S. Supreme Court. Parties have until February 19, 2020, to file a petition for a writ of certiorari in the Supreme Court.

If you have questions about the *Prometheus* decision or the FCC's media ownership rules, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed on this client alert.